Ohio House Government Accountability & Oversight Committee
Testimony of Dennis Hetzel, Executive Director, Ohio Newspaper Association
Senate Bill 321 – Open Records Appeals Process
May 24, 2016

Chairman Brown, Vice-Chair Blessing, Ranking Member Clyde and other committee members, thank you for this opportunity to testify in support of Senate Bill 321. Creating a statutory appeals process for access to public records has been a legislative goal of the Ohio Newspaper Association for several years. We are proud to support President Faber's bill, which also has the potential to be a national, precedent-setting model for an excellent way to handle these appeals.

Sen. Faber outlined how this procedure would work in his sponsor testimony, so we won't repeat that here. What we would like to do is provide some background to demonstrate why this is important.

We recently worked with the National Freedom of Information Coalition and my colleagues from around the country to update research conducted a few years ago by the Reporters Committee for Freedom on the Press. Most states – around 28 depending on how you do the scoring -- have some type of expedited, statutory procedure that allows a citizen to appeal a denial without having to hire a lawyer and go to court.

The states handle this in different ways. In Kentucky, for example, the attorney general's office issues binding opinions. Indiana has a "public access counselor" with limited powers. Pennsylvania created an entire office of open government a few years ago. The unique process Sen. Faber has proposed logically places the review in an office – the court of claims – that exists precisely to be a fair judge of claims against the government.

Here in Ohio, Attorney General DeWine and Auditor General Yost deserve credit for their programs to deal with records denials, but I think they both would admit there are significant limitations. For example, the attorney general's program only handles disputes with local governmental bodies through mediation. Either side can stop the process by not agreeing to mediation. Also, since these programs aren't required by statute, future office holders could discontinue them. This process likely will preclude the need for these programs to continue.

So, why do we think this is so important? First of all, these are the public's records. Government is the custodian, not the owner, of public records. Most government officials try to do the right thing under the law, but it's a tremendous advantage to the government if your only recourse is to hire a lawyer and go to court if you're denied access. An expedited, fair appeals process levels the playing field. It's obvious why this is so: Most citizens or organizations will eventually give up when faced with a potential lengthy and costly court battle as the only option. Even media organizations, which seriously take their obligation to be watchdogs of government, do not have the resources to pursue these cases to the extent that they would have in the past.

At the ONA, we have a legal hotline in which I'm the first point of contact, and it is rare week when I don't have several calls from Ohio journalists seeking help on open records cases. In many situations, I mainly

provide advice on how to best work with the government officials to gain access, and often these situations get resolved. Still, there is no way of knowing how many matters do not get resolved because citizens or organizations lack the resources to continue. We also see cases in which this process could have saved hundreds of hours and thousands of dollars for both citizens and governmental bodies.

For example, the case Cincinnati Enquirer v. Sage got to the Ohio Supreme Court in 2015 before the court, in essence, told the Butler County prosecutor that he was playing games to drive up the newspaper's costs in a dispute over the release of 911 recordings in a murder case. The tapes clearly were public records. The litigation lasted more than three years and the legal fees reportedly exceeded $50,000. If you go to the spreadsheet maintained by the Ohio Coalition for Open Government of Ohio Supreme Court decisions in open government cases, you will find many examples of cases that involved average citizens and could've used this process.

This legislation is all the more important because in Ohio the penalties for violations of the law are light and not supposed to be punitive -- $100 per day up to a maximum of $1,000. It also is quite difficult to get attorney's fees, even if you are correct and the government broke the law. With that in mind, consider the unusual nature of records disputes. In most litigation, you want money as relief. In a records case, you want the record. And, certainly in the case of many requests from journalists, everyday citizens and businesses, time is of the essence. The end result is that government has a tremendous advantage whenever it wants to say "no."

This procedure also will help governments. Many disputes represent an honest difference of opinion on what the law says. Both sides want quick, effective resolution. Consider that only a handful of Ohio's thousands of governmental units have staff attorneys with expertise in these areas. Litigation often means hiring outside counsel or relying on the limited, valuable time of a general counsel on retainer. With this process, in less than two months in most cases at a cost of $25 to the citizen, both sides will get a clear answer. Both sides maintain appeal rights as well if they don't like the outcome.

Related to attorney fees, we should note that this bill accomplishes another needed reform that has received less attention but is quite important. About two years ago, the Ohio Supreme Court considered a case, DiFranco v. South Euclid, that made it impossible for a citizen to collect attorney fees in certain types of open records cases, even though Ms. DiFranco was right and the government's foot-dragging and overall response demonstrated bad faith. The court got to this result based on the specific wording of the state law, ruling that unless the court issued a formal writ, no fees could be awarded. In other words, a governmental body could simply run out the clock with the plaintiff until the last minute and then release the record, knowing there could be no liability for the aspect of the case that was, by far, the most costly – the legal bills.

In consulting with those who sponsored this law, including former Sen. Mark Wagoner, all agreed that this was not the legislative intent. Sen. Faber's bill opens a path to fees if a writ isn't issued but the law was

broken. Government groups should not be fearful this will mean major changes in the award of attorney fees. It simply means it now will be possible, when appropriate in the judgment of the court, instead of impossible.

With that in mind, we would propose one change that has surfaced as we studied the bill in detail. In the process of addressing the fee issue, the proposed language quite significantly limits the circumstances under which a court can award attorney fees. Note that while the new process will be hugely beneficial in many circumstances, some cases can and should still go to court. Under current law, once a court enters a judgment, fees may be awarded, though subject to reduction (and, as noted, are rarely awarded). As written in SB 321, fees only may be awarded in three specific circumstances, but the court has no generalized discretion to award fees if an order has been entered. For example, it appears that this bill would not have allowed an award in the "Sage" case referenced earlier.

The remedy seems relatively simple: Restore some of the stricken language at Line 563 so that the court continues to have discretion to award fees if a judgment has been rendered. Fees still would be subject to reduction or even denial. Even with this restoration, there no longer is equivalence on fee awards: The court "shall not" award fees in some circumstances. However, there are no "shall" situations that require fee awards. The law also guides courts to reduce fees if an "alternative process" – namely, this court of claims procedure – would have been more suitable to resolve the dispute.

Our language would read like this:

> (b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section or any of the following applies, the court may award reasonable attorney's fees to the relator, subject to the provisions of divisions (C)(4) of this section:

For now, we are pleased to join the editorial writers and elected officials from both sides of the aisle who already have spoken in support of this appeals process. We thank Sen. Faber for his efforts, and we urge the committee to consider it favorably.

Thank you for this opportunity to testify, and we will be happy to answer any questions you have.

Sampling of positive editorial comment to date:

Columbus Dispatch editorial

Akron Beacon Journal editorial

Canton Repository editorial

Findlay Courier editorial

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